



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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July 23, 1998

FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF CHIEF COUNSEL

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW Suite 222
Washington, DC 20554

ORIGINAL

EX PARTE OR LATE FILED

RE: Notice of Ex parte Presentation in a Non-Restricted Proceeding
In re Implementation of the Telecommunications Act of 1996: Telecommunications
Carriers' Use of Customer Proprietary Network Information and Other Customer
Information (CC Dkt. No. 96-115).

Dear Ms. Salas:

The Office of Advocacy, U.S. Small Business Administration, by its undersigned representative and in accordance with Section 1.1206 of the Commission's rules, hereby respectfully requests the Commission's acceptance of the attached ex parte notification which is filed one day late. We experienced an unexpected computer shut-down and printing difficulty that prevented the timely filing of this ex parte notice.

Please call the undersigned if you have any questions. Thank you.

Yours truly,


S. Jenell Trigg, Esq.
Assistant Chief Counsel for Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 Third Street, SW
Washington, DC 20416

attached

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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

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RE: Notice of Ex parte Presentation in a Non-Restricted Proceeding
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Carriers' Use of Customer Proprietary Network Information and Other Customer
Information (CC Dkt. No. 96-115).

Dear Ms. Salas:

The Office of Advocacy, U.S. Small Business Administration, by its undersigned representative and in accordance with Section 1.1206 of the Commission's rules, hereby respectfully submits an original and one copy of this ex parte notification.

S. Jenell Trigg, Assistant Chief Counsel for Telecommunications, had a telephone conversation with Thomas Power, Legal Advisor for Chairman William E. Kennard on Wednesday, July 22, 1998, regarding issues consistent with the written ex parte presentation filed with the Commission on July 16, 1998. Advocacy's ex parte filing asserted that the Commission violated the Administrative Procedure Act and the Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, in its Second Report and Order that promulgated rules for electronic flag and audit safeguards for all telecommunications carriers.¹

One additional issue raised in this telephone conversation not previously discussed are several statutory violations in the Commission's compliance with the Paperwork Reduction Act of 1995 ("PRA"). Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified at 44 U.S.C. § 3501 et seq.). Although approval of the Office of Management and Budget ("OMB") for increased reporting and recordkeeping burdens are not subject to judicial review, 44 U.S.C. § 3507(d)(6),² the courts have held that a rule which violates the PRA is unenforceable. Pacific Nat'l Cellular v. United States, 1998 WL 214259 (rel. April 28, 1998); see also Career College Ass'n v. Riley, 74 F.3d 1265 (1996). In brief, Advocacy believes the FCC's PRA procedures are deficient because the Commission did not develop a specific, objectively supported estimate of burden, 44 U.S.C. § 3506(c)(1)(A)(iv); and through public notice and comment, evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; evaluate whether the proposed collection is necessary; and enhance the quality, utility, and clarity of the information to be collected. 44 U.S.C. §§ 3506(c)(2)(a)(i)-(iii).

¹ In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 96-115, FCC 98-27 (rel. Feb. 26, 1998).

² OMB granted its approval of the FCC's PRA request for the Second Report and Order on June 23, 1998. It was published in the Federal Register on July 21, 1998. 63 FR 39086 (1998).



Ms. Magalie Roman Salas
July 23, 1998
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The Commission has a statutory duty to "minimize the paperwork burden for . . . small businesses . . . and other persons resulting from the collection of information by or for the Federal Government; [and to] ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government." 44 U.S.C. §§ 3501(1)-(2). The PRA, like the RFA, requires that an agency undertake an analysis of the costs and burden of its rulemaking on small businesses during its rulemaking deliberations and to provide an opportunity for public notice and comment on any proposed information collection at the NPRM stage. 44 U.S.C. § 3506(c)(2)(B). However, both the NPRM and its PRA analysis are silent on the burdens of any form of safeguards because the NPRM tentatively concluded to not impose safeguards on all telecommunications carriers. In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information (CC Dkt. No. 96-115), Notice of Proposed Rulemaking, 11 FCC Rcd 12513, para. 36 (1996).

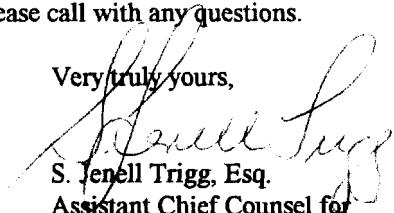
Once the Commission changed its mind on this conclusion, it then had a duty to submit new data to OMB if there was a "substantial modification" in its PRA request for approval. 44 U.S.C. § 3507(d)(4)(D). The addition of audit and flag requirements, and the extension of mechanized safeguards to all telecommunications carriers to those not previously subject to Computer III requirements, would qualify as a substantial modification by any standard. Modified information on the burden of such requirements should have been submitted to OMB "at least 60 days before the issuance of the final rule." Id. (emphasis added). The FCC's modified supporting statement to include the flag and audit requirements was submitted to OMB on April 16, 1998, almost two months after adoption of the rule and 4 months beyond the statutory due date. More importantly, there are zero estimates in the section where the cost of the audit and the flag requirements should have been included. Given that the FCC's request was not complete, we question whether OMB's approval includes the approval for the flag and audit requirements.

Advocacy realizes that the supporting data to OMB are only estimates. However, lacking in the development of the Commission's estimates are the cost of upgrades for software and hardware, installation, personnel training and workload, professional skills required, and required maintenance of a year-long database for different sized telecommunications carriers, especially small carriers that may not have computer equipment at all. Given the absence of any record evidence from the industry due to the lack of adequate notice and opportunity to comment, the Commission's estimates are speculative at best and unreasonable at worst.

In summary, the Commission has failed to meet the statutory requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act. Separately, the violations for each one of the above Acts are sufficient to find the Second Report and Order arbitrary and capricious. Cumulatively, these are overwhelming grounds for the Commission to vacate or stay the flag and audit requirements, issue a Further Notice of Proposed Rulemaking if it wishes to impose mechanized safeguards. We sincerely hope that the Commission will act swiftly in its evaluation of these violations.

Thank you for your assistance in this matter. Please call with any questions.

Very truly yours,


S. Jenell Trigg, Esq.
Assistant Chief Counsel for
Telecommunications

Ms. Magalie Roman Salas

July 23, 1998

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U.S. Small Business Administration
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cc: The Honorable William E. Kennard
 The Honorable Susan Ness
 The Honorable Michael Powell
 The Honorable Harold Furchtgott-Roth
 The Honorable Gloria Tristani
 Mr. Tom Power, Legal Advisor to Chairman Kennard
 Mr. Kevin Martin, Legal Advisor to Commissioner Furchtgott-Roth
 Mr. Paul Gallant, Legal Advisor to Commissioner Tristani
 Mr. Kyle Dixon, Legal Advisor to Commissioner Powell
 Mr. Jim Casserly, Legal Advisor to Commissioner Ness
 Ms. Kathryn C. Brown, Common Carrier Bureau Chief